NO. 95394-5

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

In re Personal Restraint of

Time Rikat Meippen

Petitioner

BRIEF OF WACDL AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

FEDERAL CASES:

STATUTES, RULES AND OTHER AUTHORITY

INTRODUCTION

Children are constitutionally different than adults at sentencing; as a rule, their immaturity lessens their culpability. For this reason, in State v. Houston-Sconiers, 188 Wn.2d 1, 392 P.3d 409 (2017), this Court concluded that due to their mandatory nature sentence enhancements under Washington's Sentencing Reform Act ("SRA") are unconstitutional as applied to juvenile offenders. The Court therefore held that sentencing courts have discretion to impose any sentence below the standard SRA range and any applicable mandatory sentence enhancements when sentencing juvenile offenders. This Court did not restrict its holding in Houston-Sconiers to any sub-class of offenders, stating expressly that judges have absolute discretion when sentencing any juvenile offender under the SRA. Houston-Sconiers applies to sentences under twenty years as well as longer sentences.

Houston-Sconiers should apply retroactively to cases on collateral review because before the decision sentencing courts had no discretion to sentence below mandatory sentence enhancements. Thus, Houston-Sconiers represents a significant change in the law and constitutes an exception to the one-year limitation on collateral attacks on judgments in criminal cases.

A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondent Time Rikat Meippen. WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has approximately 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

B. ISSUE OF CONCERN TO AMICUS

1. Whether the Eighth Amendment and this Court's decision in Houston-Sconiers require that sentencing courts retain discretion over all portions of a juvenile sentence even when sentencing juvenile defendants to less than 20 years in prison?

2. Whether this Court's decision in Houston-Sconiers, holding that sentencing judges retain discretion when applying otherwise mandatory sentence enhancements to juvenile sentences, should be applied retroactively to cases on collateral review?

C. STATEMENT OF THE CASE

A complete statement of facts is set forth in the decision of the Court of Appeals, State v. Meippen, 149 Wn. App. 1014, 2009 WL 597290 at paragraphs 1-3. Relevant here are the facts which show Time Meippen's lack of maturity and his impulsivity in committing the crime which led to his convictions for first degree assault, first degree robbery and unlawful possession of a firearm and his 231-month, or 19.25-year prison sentence. See State's Response, Appendix at 4. In addition, Meippen's sentence includes a 60-month mandatory firearm enhancement that will run consecutive to the sentence imposed for the underlying offenses. See id.

Meippen was 16 years old when he entered a tobacco shop where he had tried repeatedly and unsuccessfully to buy cigarettes in the past. Meippen, at paragraph 1. After being refused cigarettes, as he customarily was:

> [t]he young man then picked up a package of candy and set it on the counter. Hong [the clerk] proceeded to ring up the purchase as the young man put money on the counter. Looking downward, Hong then opened up the cash register drawer to make change. At this point, Hong felt something slam into his head [he later learned he had been shot]. . . . As Hong lay dazed on the floor, he heard rustling above him. He then heard the sound of someone running across the store and out the door.

Id. at paragraphs 1-2. Hong was later able to identify Meippen "as a

regular customer." Id, at paragraph 2. A woman who worked at the Subway store next door had been on break outside the shop when Meippen entered the tobacco store and saw him run out with "money and items flying everywhere from the pockets of his sweatshirt." Id. at paragraph 1.

Through his personal restraint petition Meippen seeks resentencing based on the change in law effected by this Court's decision in Houston-Sconiers, which held that sentencing judges have discretion to depart from mandatory sentencing enhancements when sentencing juvenile offenders.

D. ARGUMENT AND AUTHORITY

1. THE EIGHTH AMENDMENT REQUIRES THAT SENTENCING COURTS RETAIN DISCRETION OVER ALL PORTIONS OF A JUVENILE SENTENCE REGARDLESS OF THE LENGTH OF THE SENTENCE IMPOSED.

In Miller v. Alabama, 567 U.S. 460, 132 S Ct. 2455, 183 L. Ed. 2d 407 (2012), the Supreme Court reaffirmed that "children are different" from adults, and held that sentencing courts must consider youth and its inherent characteristics, such as, "lack of maturity and an underdeveloped sense of responsibility," "vulnerability to negative influences and outside pressures," and "greater capacity for change," before imposing a state's harshest penalties. See id. at 2468. While Miller held specifically that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits the imposition of a mandatory life-without-parole sentence on a juvenile

defendant, the Court emphasized in Miller that the Eighth Amendment's primary concern is proportionality. The Court explained that "[t]he concept of proportionality is central to the Eight Amendment" and that proportionality in the Eighth Amendment context is not considered "through a historical prism" but rather "according to the evolving standards of decency that mark the progress of a maturing society." See id. at 2463. In other words, the Eighth Amendment is not concerned with the length or severity of a particular sentence in a vacuum, but with the proportionality of the sentence to the "offender and the offense." See id. Thus, the Supreme Court in Miller considered what recent advances in science have taught us about the juvenile brain to conclude that it is unconstitutional to impose a mandatory sentence of life-without-parole on a juvenile defendant without allowing the trial court to make an individualized sentencing decision, taking into consideration the defendant's youth and its impact on the defendant's culpability. See id. at 2468.

In State v. Houston-Sconiers, this Court applied Miller in the context of mandatory sentencing enhancements under the Washington Sentencing Reform Act ("SRA"). In that case, two juvenile defendants, 17 and 16 years of age at the time of their offenses, were sentenced to 31 years in prison and 26 years in prison, respectively, for using a gun to take

candy from groups of trick-or-treaters on Halloween night. See Houston-Sconiers, 188 Wn. 2d at 8. The sentences of 31 and 26 years were based entirely on mandatory firearm enhancements -- the sentencing court imposed exceptional sentences below the standard ranges of zero months for the underlying substantive offenses. See id. at 12-13. While the sentencing court and the parties acknowledged during sentencing proceedings that, even with zero months on the underlying sentences, the sentences imposed on the defendants as a result of the mandatory firearm enhancements were still excessive in proportion to the nature of the offenses and the defendants' ages, the court found that it lacked the power under the SRA to exercise discretion when imposing time for mandatory firearm enhancements, which would have to be served consecutively as flat time, i.e. the defendants would not be entitled to early release credits. See id. Citing Miller's conclusion that "children are different," this Court reversed and remanded for resentencing. The Court unequivocally stated in Houston-Sconiers:

> In accordance with Miller, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have

> discretion to impose any sentence below the otherwise applicable SRA range and or/sentence enhancements.

Id. at 21. The Court ultimately held that the mandatory nature of sentencing enhancements violates the protections that the Eighth Amendment guarantees to juvenile defendants. See id. at 25.

Meippen, who was 16 years old at the time he committed his offense, requests that the Court remand his case for resentencing so that the trial court can consider whether reduction of his 231-month sentence, which includes a 60-month mandatory firearm enhancement, is appropriate based on recent changes in state and federal law on juvenile sentencing, in particular the changes in law effected by Miller and Houston-Sconiers.

The State argues in its response to Meippen's motion for discretionary review that Miller and the Eighth Amendment's Cruel and Unusual Punishments Clause have no application where a sentence of less than 20 years' imprisonment is imposed, as in Meippen's case.

The State's argument conflicts with the clear holding of this Court's decision in Houston-Sconiers. Further, the State's position conflicts with other precedents where this Court has applied the Eighth Amendment to juvenile sentences shorter than 20 years. See State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015); State v. Watkins, 423 P.3d

830 (2018). First, the State's argument is inconsistent with this Court's holding in Houston-Sconiers. This Court did not hold in that case that sentencing courts can only exercise discretion under the SRA when sentencing a juvenile to 20 years of imprisonment or more. Rather, what this Court held is that sentencing courts have absolute discretion under the SRA whenever a juvenile is sentenced as an adult. See Houston-Sconiers, 188 Wn.2d at 21. Indeed, this Court emphasized in Houston-Sconiers that "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant." See id. (emphasis added). Surely, had this Court intended its holding in Houston-Sconiers to apply to the sub-class of juvenile defendants sentenced to 20 years' imprisonment or more it would have said so expressly. The directive issued by this Court in Houston-Sconiers is clear: sentencing courts must have complete discretion over all portions of a juvenile's sentence when a juvenile is sentenced in adult court.

In light of Houston-Sconiers' clear mandate, there is no reason to distinguish between a juvenile defendant who has been sentenced to 20 years in prison, and a defendant who has been sentenced to 19.25, like Meippen.

The State's position also conflicts with other decisions of this Court applying the Eighth Amendment to juvenile sentences shorter than

20 years. In State v. O'Dell, this Court extended Miller's reasoning to a 95-month standard range sentence imposed under the SRA on an 18-year-old defendant convicted of a felony. See O'Dell, 183 Wn.2d at 683. In O'Dell, the sentencing judge concluded based on pre-Miller state precedent that he did not have discretion to impose an exceptional sentence below the standard range simply because the defendant's relative youth prevented him from fully appreciating the wrongfulness of his conduct. See id. at 697. This Court rejected the sentencing court's reasoning, holding that in light of the Supreme Court's reasoning in the Miller line of cases, the sentencing court abused its discretion by failing to consider whether the defendant's youth diminished his culpability and therefore permitted the imposition of an exceptional sentence below the standard range. See id. at 689.

While the Court in O'Dell did not expressly ground its decision in the Eighth Amendment, it relied heavily on the psychological and neurological studies cited by the Supreme Court in Roper v. Simmons, 243 U.S. 551, 125 S. Ct, 1183, 161 L. Ed, 2d 1 (2005), Miller, supra., and Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), noting that the legislature did not have the benefit of the science behind those decisions when it enacted the SRA and that there was therefore "no way for our legislature to consider these differences when it

made the SRA sentencing ranges applicable to all offenders over 18 years of age." Id. at 693. O'Dell's heavy reliance on Roper, Miller, and Graham, and the science underlying those decisions confirms that the Eighth Amendment applies to sentences imposed on youths under the SRA even when the sentence is well under 20 years' imprisonment.

This Court also considered the applicability of the Eighth Amendment to SRA sentences imposed on juveniles in State v. Watkins. See Watkins, 423 P.3d at 832. In that case, the defendant's case was transferred to adult court as a result of the application of Washington's automatic decline statute, former RCW 13.04.030(I)(e)(v)(D). See id. at 832. The 16-year-old defendant was tried as an adult and sentenced to 16 months in prison. See id. He argued on appeal that Washington's automatic decline statute violated the Eighth Amendment based on recent developments in Eighth Amendment case law, including Miller and Houston Sconiers. Id. at 834. This Court rejected the defendant's argument. The Court concluded that Washington's automatic decline statute did not violate Eighth Amendment's prohibition on cruel and unusual punishments specifically because under Houston-Sconiers, "adult courts have discretion to depart from standard sentence ranges to avoid excessive punishment of juveniles." Id. at 834 (citing Houston-Sconiers, 188 Wn.2d at 21). This Court's holding in Watkins makes clear that the

Court has construed the Eighth Amendment to require the exercise of discretion by judges whenever a juvenile is sentenced in adult court regardless of the length of the sentence imposed. As the Court explained in Watkins:

> Houston Sconiers and Miller were concerned with the "choice between extremes" that judges face when determining whether to assign juvenile or adult court jurisdiction. But Washington no longer faces a choice between extremes because this court declared in Houston-Sconiers that trial courts have discretion to sentence juveniles below the applicable sentencing range in accordance with their culpability.

Id. at 838 (internal citations and quotation marks omitted).

The State further relies on this Court's decision in State v. Scott, 416 P.3d 1182 (2018), in support of its contention that the Eighth Amendment applies only to juvenile sentences longer than 20 years. But, the question before this Court in Scott was completely different from the question before this Court in Meippen's case. At the time this Court considered Scott, the defendant had served approximately 28 years in prison and had made an unsuccessful request for parole to the Indeterminate Sentencing Review Board pursuant to RCW 9.94A.730, Washington's Miller-fix statute. See Scott, Slip op. at 12 - 13. Thus the question before the Court in Scott was whether consideration for parole eligibility under RCW 9.94A.730 was sufficient to satisfy the

requirements of Miller without a new sentencing hearing. See id. at 1. The decision in Scott simply has no bearing on the issue of whether the Eighth Amendment requires resentencing in the case of a juvenile defendant sentenced as an adult where the defendant is not eligible for parole under RCW 9.94A.730. Nor does the decision in Scott alter this Court's holding in Houston-Sconiers, which requires that sentencing courts exercise discretion over all portions of a juvenile sentence when "any juvenile" is sentenced in adult court. See Houston-Sconiers, 188 Wn.2d at 21. The decision in Scott holds only that, for juveniles sentenced in the past, a parole hearing – at which the juvenile's age and immaturity can be considered – is sufficient to satisfy the Eighth Amendment.

The Eighth Amendment and clear precedent from the United States Supreme Court and Washington courts require that sentencing courts retain discretion over all portions of juvenile sentences regardless of the length of sentence imposed.

2. HOUSTON-SCONIERS APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW

The Court should apply Houston-Sconiers retroactively. RCW 10.73.090 imposes a one-year time limit on collateral attacks on judgments. However, RCW 10.73.100(6) provides that the time limit

specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on the fact that:

> There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6). A decision constitutes a "significant change in the law" for purposes of RCW 10.73.100(6) when it "has effectively overturned a prior appellate decision that was originally determinative of a material issue." See In re Personal Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000). "One test to determine whether an appellate decision represents a significant change in law is whether the defendant could have argued this issue before publication of the decision." In re Personal Restraint of Stoudmire, 145 Wn.2d 258, 264, 5 P.3d 1240 (2001).

Applying the tests set forth in this Court's retroactivity precedents, it is clear that Houston-Sconiers constitutes a "significant change in the law" within the meaning of RCW 10.73.100(6). Prior to Houston-Sconiers, this Court had held in State v. Brown, 139 Wn.2d 20, 983 P.2d

608 (1998), that trial courts do not have discretion to impose sentences that are shorter than those required by the mandatory sentence enhancements provisions of the SRA. Thus, prior to Houston-Sconiers, juvenile defendants in Meippen's position were precluded by Brown from arguing that sentencing courts had discretion to depart from mandatory sentence enhancements. Now, under Houston-Sconiers, litigants in Meippen's position are free to argue that mandatory sentence enhancements added to their sentences should run concurrently or be waived all together. Houston-Sconiers is a significant change in law within the meaning of RCW 10.73.100(6) and should be applied retroactively to cases on collateral review.

C. CONCLUSION

Amicus urges the Court to grant Meippen's personal restraint petition and remand his case to the Superior Court for resentencing.

Respectfully submitted,

DATED this 27th day of September, 2018

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